Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1997

BRIAN McCORD,

Petitioner,

vs.

MICHAEL MILLWARD, WARDEN, STANLEY SRAL and LISA OZIO, PAROLE OFFICERS, and EARNEST PRE[illegible]TE, ATTORNEY GENERAL,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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4788

QUESTION PRESENTED FOR REVIEW

Was Petitioner McCord denied federal rights to a speedy trial and effective assistance of counsel due to his attorney's failure to raise what should have been obvious federal claims of pre-trial and post-trial delays?

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STATEMENT OF JURISDICTION

On June 3, 1997, the United States Court of Appeals for the Third Circuit denied Petitioner McCord's application for a certificate of appealability upon the dismissal of his Petition for Habeas Corpus Relief pursuant to 28 U.S.C. § 2254. (App. A, 1a-12a).

On August 26, 1997, McCord's Petition for Panel Rehearing was denied by the same court. (App. D, 30a).

Petitioner McCord seeks a Writ of Certiorari pursuant to 28 U.S.C. A. § 1251(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution

Sixth Amendment (App. E, 32a):

> the accused shall enjoy the right to a speedy and public trial

and

> to have the assistance of counsel for his defense

Fourteenth Amendment (App. E, 32a):

> nor shall any State deprive any person of life, liberty or property, without due process of law

STATEMENT OF THE CASE

On February 27, 1979, Petitioner's Altoona, PA grocery store was destroyed by fire. Almost 5 years later, on November 4, 1983, Petitioner was indicted on a charge of arson. In November of 1985 McCord filed an unsuccessful Rule 1100 motion to dismiss charges on state speedy trial grounds. The commonwealth later filed multiple successful motions for extensions of time pursuant to the same Rule 1100. Petitioner's jury trial did not commence until 3 years had passed after the filing of the charges.

Initial post-trial motions were timely filed on December 10, 1986 and remained pending until they were denied on June 20, 1990. Petitioner filed a Supplemental Post-Trial Motion six months later on January 3, 1991, which was denied on March 19, 1991. Petitioner was sentenced to 11½ to 23 months in prison on March 19, 1991 and fined $18,000. The Superior Court of Pennsylvania affirmed Petitioner's conviction and sentence on March 17, 1992 and the Pennsylvania Supreme Court denied his Petition for Allowance of Appeal on November 9, 1992.

When the Pennsylvania Supreme Court refused to grant McCord's request for an allowance of appeal, he was ordered to begin his 11½ to 23 month sentence starting December 18, 1992. Two days before he was to begin serving his sentence, McCord filed his first Writ of Habeas Corpus in the United States District Court for the Western District of Pennsylvania raising for the first time his speedy trial claims in federal terms. This habeas petition stayed McCord's service of his jail sentence until July

1, 1993 when Chief Judge Ziegler dismissed the habeas petition for failure to exhaust state remedies and dissolved the stay of execution of sentence. McCord served his sentence beginning the following week.[1]

Following District Court Judge Ziegler's suggestion, McCord, still with original counsel, returned to state court and filed a PCRA petition to exhaust his state remedies on his federal speedy trial claim. The Blair County Court of Common Pleas denied the PCRA petition on its merits on August 17, 1993 ruling that trial counsel was barred from asserting his own effectiveness in not raising the federal speedy trial claims earlier.

New (and present) counsel timely filed an appeal to the Pennsylvania Superior Court which affirmed the trial court's ruling. The Pennsylvania Supreme Court denied the Petition for Allowance of Appeal 18 months later on February 16, 1996. Petitioner filed this Habeas Corpus Petition on June 8, 1995 while he was still on parole. Petitioner is challenging his conviction on these matters with all of its collateral consequences.

Petitioner believes that he was ineffectively represented by counsel who failed to timely and appropriately raise his federal claim of pre-trial and post-trial delay. When trial counsel finally sought to raise these claims in a PCRA proceeding, *no witnesses*, not even Petitioner, were called to give evidence in support of the claim and to show how he was prejudiced by the delay.

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1. Although he had been free on bail for almost 10 years, McCord had his $10,000 bail forfeited when the state court, apparently in a fit of pique, found McCord was late reporting to jail a week after District Court Judge Zeigler dissolved the stay of execution of sentence on July 1, 1993. The state court refused to exonerate or remit the bail forfeiture on July 16, 1993 during the PCRA hearing, even though the prosecutor understandably took no position on the bail issue.

The present Petition was filed before the Pennsylvania Supreme Court denied allowance of appeal but while McCord was still on parole. McCord argued that the delays excused exhaustion and the district court accepted this argument (App. C, 18a).

REASONS FOR GRANTING THE WRIT

In his June 25, 1996 report and recommendations to Judge Donetta Ambrose of the United States District Court for the Western District of Pennsylvania, Magistrate Keith Pesto anticipated and set the stage for this Petition.

Although Judge Pesto found that the failure of trial counsel to raise federal claims did not prejudice the Petitioner and therefore under *Strickland v. Washington*, 466 U.S. 668 (1984) trial counsel was not ineffective, he did so "by the narrowest of margins" (App. C, 15a) and overlooked the clear implications of *Doggett v. United States*, 120 L. Ed. 2d 520 (1992).

Petitioner maintains this is the "rare claim" envisioned by *United States v. Gray*, 878 F.2d 702, 711 (3d Cir. 1989) where counsel's performance was so deficient he was not functioning as "counsel" guaranteed by the Sixth Amendment when he failed to raise the federal claims in the face of such great delays and the known conditions in Blair County, Pennsylvania during the 1980s. In *Gray* the Third Circuit granted a new trial where counsel failed to investigate and interview witnesses he knew to exist. At least in *Gray* the district court granted an evidentiary hearing to evaluate the ineffective assistance of counsel claim. Here McCord has been denied even a hearing in both federal court and in state court!

Magistrate Judge Pesto, rather than resolve the matter by giving Petitioner McCord the presumption of prejudice

envisioned and described by *Doggett v. United States*, 120 L. Ed. 2d 520 (1992) chose to overlook the disastrous court delay situation in Blair County, Pennsylvania in the 1980s, overruled *Doggett* and placed the burden of showing prejudice back on McCord. This was done without any hearing.

The federal courts (Western District of Pennsylvania and Third Circuit) have rejected McCord's pre- and post-trial federal speedy trial claim and his effective assistance of counsel claim even though trial counsel, when he finally tried to make the federal speedy trial claim in a PCRA hearing failed to call *any* witnesses to show the needed prejudice element required by *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

McCord maintains either he should prevail by being given the benefit of the presumption of prejudice in *Doggett* or he should be given at least a hearing on the question of ineffective assistance of counsel issue. Instead his Writ of Habeas Corpus was denied "by the narrowest of margins" because his attorney missed not only his obvious federal speedy trial claims but failed to call *any witnesses* at the PCRA hearing to show what the district court says is the required prejudice.

As Magistrate Judge Pesto neatly stated:

> It is necessary to examine whether petitioner's trial counsel's failure to raise federal claims was the overlooking of such an obviously meritorious defense that counsel was not performing as the counsel guaranteed by the Sixth Amendment.

(App. C, 21a).

Magistrate Pesto inexplicably declared that:

> a finding of ineffectiveness cannot be made on this ground (excessive delay presumptively compromises the reliability of trial, *Doggett v. United States*, 120 L. Ed. 2d 520 at 531) since it "would not have been apparent to any trial counsel prior to trial in 1986, and probably not until *Doggett* in 1992, that a federal claim based on pre-trial delay could have had a reasonable chance of success." (App. C, 25a).

This excuse, intended to explain away trial counsel's failure to raise obvious federal claims, rings hollow in the face of the evidence in appeals before the Pennsylvania Supreme Court in *Commonwealth v. Glass*, 526 Pa. 329, 586 A.2d 369 (1991) and *Burkett, Schandelmeier* and *Hooper infra*, in the federal courts.

In *Commonwealth v. Glass* the Pennsylvania Supreme Court noted "this is one of a series of cases in which inordinate delays have been observed in sentencing procedures in Blair County." The Pennsylvania court went on to declare that the "delays caused by these factors were plainly the result of negligence, inefficiency, or overcrowding in the courts of Blair County."

In *Burkett v. Cunningham*, 826 F.2d 1208 (3d Cir. 1987) the Court of Appeals faced "an almost unbelievable situation" where Burkett had not been sentenced 5½ years after trial and two years after a federal district court declared that Burkett's right to a speedy trial would be violated if he were not sentenced within 60 days.

In *Schandelmeier v. Cunningham*, 819 F.2d 52 (3d Cir. 1986) the court was "severely troubled" by the case and "most distressed" by the delay in sentencing. By 1986 pending habeas

corpus cases from Blair County had already aroused "concerns" in federal court so much that specific notice was being directed to the Chief Justice of Pennsylvania. (819 F.2d at 55).

Hooper v. Cunningham, Civ. No. 84-2818, slip op. at 4, 9 (W.D. Pa. Feb. 21, 1985) [available on Westlaw DCT database] (Blair County prisoner unsentenced for 37 months after trial must be discharged from custody), motion to withdraw appeal granted, No. 85-3161 (3d Cir. Sept, 18, 1985).

Where was trial counsel in 1985? How can the Third Circuit explain awa[illegible] a case like this given the abundance of speedy trial abuses in Blair County throughout the 1980s, particularly when the Pennsylvania Federal Court system was filling up with cases spotlighting the abuses that McCord fell victim to in the Blair County courts. And yet here is the Third Circuit in 1997 telling McCord that even if he was presumptively prejudiced by the delays in his criminal proceedings in Blair County courts, "in 1986 few, if any, trial counsel could have predicted that a federal claim based on pretrial delay would have a reasonable chance of success". (App. A, 7a). Other attorneys raised the issue in state and federal courts.

Petitioner has an intricately woven double argument that cannot be easily taken apart and examined one part at a time. McCord claims his trial counsel was ineffective for failing to properly raise his speedy trial claims in federal constitutional terms. This is so, in spite of the district court's excuse for counsel that *Doggett* hadn't been decided yet, since the Blair County Pennsylvania courts, throughout the 1980s so routinely violated various defendant's federal speedy trial and/or due process rights that it became common knowledge in the local bar and in the federal courts. *Burkett v. Cunningham*, 826 F.2d 1208 (3d Cir. 1987); *Shandelmeier v. Cunningham*, 819 F.2d 52 (3d Cir. 1986).

The district court here invited examination of the question whether *Doggett*'s presumption of prejudice applies to claims of post-trial delay and speculated that if it did and the "conclusion should have been obvious to trial counsel, then petitioner should prevail" (App C, 28a, footnote). When McCord retained his trial counsel he could reasonably assume that the obvious appropriate issues in this case would be properly raised and presented to the courts in Pennsylvania. If any *obvious federal constitutional issues* were apparent (*e.g.*, Fourth Amendment search questions, Miranda- Fifth Amendment, or Sixth Amendment claims), McCord trusted they would at least be explored, presented and decided in state court so he could later seek review in federal courts.

The United States Court of Appeals for the Sixth Circuit accepted this question in *United States v. Smith*, 94 F.3d 204, *reh'g denied*, Oct. 1, 1996 and decided that the government and the court presented good reasons for the 3 year delay in deciding the appeal and further that the "speedy trial guarantee of the Sixth Amendment applies only to proceedings in the trial court" citing *Burkett v. Cunningham*, 826 F.2d 1208 (3d Cir. 1987).

The *Smith* court acknowledged that other circuits have held otherwise and that Sixth Amendment guarantees apply to criminal appeals via the Due Process Clause, citing *Harris v. Champion*, 15 F.3d 1538 (10th Cir. 1994) and *Simmons v. Reynolds*, 898 F.2d 865 (2d Cir. 1990).

Because of this conceded disparity among the circuit courts which have dealt with this issue, McCord submits certiorari should be granted. McCord asks a hearing on his claims that his federal Sixth Amendment trial rights were violated and that he was denied effective assistance of counsel when this claim was not properly raised and presented with supporting evidence at his PCRA hearing.

Finally, the Third Circuit missed the point when it rejected the merits of McCord's speedy trial claim and interposed the doctrine of procedural default and declared the claim waived since it was not raised in the initial PCRA petition.

In footnote 3 (App. A, 4a) of its June 3, 1997 Order, the court additionally faulted McCord for not explaining his failure to raise the due process claims in his PCRA appeal.

This is exactly McCord's point before the court. The ineffectiveness of his trial and PCRA attorney is embodied in that very failure to raise the due process claim in the first place when it was so obviously of great merit because of the common excessive delays in Blair County, Pennsylvania in the 1980s.

The Third Circuit declares McCord cannot prove he was prejudiced by his attorney's actions as required by *Strickland v. Washington*, 466 U.S. 668, 687 (1984). It is *sheer speculation* to say if he had raised his claim "McCord likely would have been granted a speedier trial" and not absolute discharge as he now seeks. This is easy to say on Monday morning, but McCord can just as easily point out that he should have either had his speedy trial as the United States Constitution guarantees or had the charges dismissed long before the actual trial on December 6, 1986, three years after the indictment.

CONCLUSION

For the foregoing reasons, Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED JUNE 3, 1997

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 96-3537

BRIAN T. MCCORD

Appellant

v.

MICHAEL MILLWARD, Warden; STANLEY SRAL, Parole Officer; LISA OZIO, Parole Officer; ERNEST D. PREATE, Attorney General

On Appeal from the United States District Court
For the Western District of Pennsylvania
D.C. Civil No. 95-CV-00148J
District Judge: Honorable Donetta W. Ambrose

Submitted Under Third Circuit LAR 34.1(a)
April 17, 1997

Before: BECKER, ALITO and MCKEE, *Circuit Judges*
(Motions Panel A)
(Filed JUN -3 1997)

MEMORANDUM OPINION OF THE COURT

BECKER, *Circuit Judge.*

Pro se appellant Brian T. McCord appeals from the dismissal

of his petition for habeas corpus relief pursuant to 28 U.S.C. § 2254. We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. For the reasons set forth below, we will deny the application for a certificate of appealability.

I.

At issue is whether Brian T. McCord ("McCord") was denied the effective assistance of counsel due to his attorney's failure to raise federal claims of improper pre-indictment, pretrial and post-trial delay. We set forth in detail below the facts and dates of the proceedings in McCord's case because they are significant to our resolution of his claim.

On November 4, 1983, McCord was indicted for an arson committed on February 27, 1979. He was convicted under 18 Pa.C.S. § 3301 on December 6, 1986, following a trial. McCord's post-trial motions, filed on December 10, 1986, were denied on June 20, 1990. A supplemental post-trial motion was denied on March 19, 1991.

McCord appealed to the Pennsylvania Superior Court, which affirmed the conviction on March 17, 1992. The Pennsylvania Supreme Court denied a timely petition for allowance of appeal on November 9, 1992.

McCord thereafter filed a petition for habeas corpus relief in the Western District of Pennsylvania on December 16, 1992, raising, *inter alia*, the issues of improper pre-indictment, pretrial, and post-trial delay on both state and federal grounds. The district court dismissed the petition for failure to exhaust state remedies, finding that McCord previously had attacked the delays in his case on state law grounds, but had failed to allege any federal grounds for relief.

McCord next filed a collateral attack on his conviction pursuant to Pennsylvania's Post-Conviction Relief Act ("PCRA"), raising federal claims based on the delays in his proceedings. The Court of Common Pleas denied the petition on its merits on August 17, 1993. McCord timely appealed to the Pennsylvania Superior Court, claiming that his trial counsel was ineffective for failing to raise the federal claims earlier. The Superior Court affirmed the trial court's order denying relief. McCord sought review by the Pennsylvania Supreme Court, which denied review eighteen months later.[1]

McCord then filed a second petition for a writ of habeas corpus with the district court. The petition was denied on August 2, 1996. He timely appealed the denial of his second habeas petition and submitted an application for a certificate of appealability to this Court.

II.

Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from the final order in a proceeding under 28 U.S.C. § 2255. 28 U.S.C. § 2253(c)(1)(B). A certificate of appealability may issue only if the applicant makes a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2); *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4, *reh'g denied*, 464 U.S. 874 (1983). The applicant need not show that he should prevail on the merits; rather, he must show that the issues are debatable among jurists of reason, that a court could resolve the issues in

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1. McCord had served his sentence and been released on parole at the time his petition for appeal was denied.

a different manner, or that the questions are adequate to deserve encouragement to proceed further.[2] *Id.*

III.

In his habeas petition, McCord claims that he was denied the effective assistance of counsel due to counsel's failure to properly raise and develop federal claims of improper pre-indictment, pretrial and post-trial delay. He also claims that he was denied his Sixth Amendment right to a speedy trial, and that his due process rights were violated by the unjustified pre-indictment, pretrial and post-trial delays. McCord failed to properly raise the claims that his due process rights were violated by the pretrial and post-verdict delays to each level of the state courts in his appeal of the denial of his PCRA petition. In Pennsylvania, a claim which is not raised in an initial PCRA petition is waived and the state courts will refuse to consider it in a subsequent petition.[3] Consequently, those claims have been procedurally defaulted and cannot be exhausted in the state courts. The doctrine of procedural default bars federal habeas review when the petitioner has failed to meet state procedural requirements. *Coleman v. Thompson*, 501 U.S. 722 (1991). This

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2. We recognize that there is currently dispute regarding whether the *Barefoot* standard still applies to proceedings under § 2255 in light of the recent changes to that section, because *Barefoot* discussed the substantial showing of the denial of a federal, as opposed to constitutional, right. *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4, *reh'g denied*, 464 U.S. 874 (1983). At least one court of appeals which has considered this question, however, has held that the standards are the same. *Lennox v. Evans*, 87 F.3d 431, 434 (10th Cir. 1996). We agree.

3. McCord has alleged no explanation for his failure to raise the due process claims in his PCRA appeal.

Court therefore will not address the merits of McCord's due process claim of improper pretrial and post-verdict delays. Additionally, because the only claim which McCord has exhausted in the state courts is whether he was denied the effective assistance of counsel, this is the only issue which we will consider on McCord's application for relief.[4] *Rose v. Lundy*, 455 U.S. 509 (1982).

Pre-Indictment and Pretrial Delays

McCord does not dispute on appeal the findings of the district court regarding his claims of ineffectiveness in conjunction with the pre-indictment and pretrial delays in his case. Rather, in his memorandum in support of his application for a certificate of appealability, McCord focuses specifically on the claim that counsel was ineffective for failing to raise the issue of improper *post-trial* delay.[5] This Court nevertheless may review the district court's disposition of McCord's claim in relation to the pre-indictment and pretrial delays, however, because we exercise plenary review over the court's legal determinations. *Sullivan v. Cuyler*, 723 F.2d 1077 (3d Cir. 1983).

We agree with the district court's finding that counsel's

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4. The district court found McCord's claim that his trial counsel was ineffective for failing to raise federal claims based on delays in the state court proceedings had been fairly presented to all levels of the state courts in his PCRA proceedings and thus was exhausted. We agree. This Court therefore will address the merits of this claim.

5. He asserts that, "the issues are debatable among jurists of reason as to whether or not there would be an ineffectiveness claim for counsel's failure to raise the *post-trial delay matters* at an earlier time." (Memorandum, 5) (emphasis added).

failure to raise a federal claim based on the four-year, eight-month delay between the arson and McCord's indictment does not constitute ineffectiveness because such a claim would not have succeeded on its merits. *United States v. Marion*, 404 U.S. 307 (1971), established that there is no pre-indictment delay claim available under the Sixth Amendment. Furthermore, although there is a due process claim that can be asserted in cases where the pre-indictment delay, although legal, is prolonged simply to give the prosecution an advantage over the accused, *United States v. Lovasco*, 431 U.S. 783 (1977), *reh'g denied*, 434 U.S. 881 (1977), McCord has made no allegations of such conduct by the prosecution. Consequently, McCord's claim that the pre-indictment delay violated his Sixth Amendment and/or due process rights is without merit. Because this claim is meritless, McCord's counsel could not be ineffective for failing to raise it. *See Rodriguez v. United States*, 17 F.3d 225, 226 (8th Cir. 1994) ("[C]ounsel's failure to advance a meritless argument cannot constitute ineffective assistance of counsel.").

McCord's ineffectiveness claim regarding the pretrial delay in his case also is meritless. *Barker v. Wingo*, 407 U.S. 514 (1972), requires a balancing of four criteria to determine whether pre-trial delay violates the Sixth Amendment. The criteria include: 1) the length of the delay; 2) the reason for the delay (*i.e.*, whose fault was it?); 3) whether there was an assertion by the defendant of his speedy trial rights; and 4) whether there was prejudice to the defendant. *Barker*, 407 U.S. at 530. The length of the pretrial delay in McCord's case, approximately three years, is sufficient under *Barker* to call for further scrutiny. The delay essentially is attributable to the State, as most of it was caused either by the prosecution or by court delay.[6]

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6. It does not matter from a constitutional standpoint whether it (Cont'd)

Furthermore, McCord's lack of demand for a speedy trial does not weigh against him because he filed pretrial motions and properly awaited their disposition. Finally, according to *Doggett v. United States*, 505 U.S. 647, 658 (1992), which held that delay not caused by the accused is prejudicial in and of itself, McCord was presumptively prejudiced by the delay.

Although most of the *Barker* factors weigh in McCord's favor on his pretrial delay claim, in 1986 few, if any, trial counsel could have predicted that a federal claim based on pretrial delay would have a reasonable chance of success. The potential success of such a claim probably would not have been apparent until *Doggett* was decided in 1992. We therefore conclude that prior to the *Doggett* decision, McCord's counsel could not be held responsible for predicting that a pre-indictment and/or a pretrial delay claim would be successful when no actual prejudice to the defendant could be shown as a result of the delay(s).

In addition, McCord cannot prove that he was prejudiced by his attorney's actions as required by *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Specifically, McCord must show that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. McCord cannot make such a showing, because even if his attorney had asserted and succeeded with the pretrial delay claim, McCord likely would have been granted a speedier trial and not the relief which he now seeks, *i.e.*, absolute discharge of his conviction. He therefore can establish neither the deficient

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(Cont'd)

was the prosecution's or the court's legitimate purposes which caused the delay because both are delay attributable to the State. *See Burkett v. Cunningham*, 826 F.2d 1208, 1223 (3d Cir. 1987), *cert. denied*, 505 U.S. 1229, 112 S.Ct. 3055, 120 L.Ed.2d 921 (1992).

attorney performance nor the prejudice required by *Strickland* in relation to his pre-indictment and pretrial delay claims. Consequently, McCord's claim of ineffective assistance based on counsel's failure to object to the pre-indictment and pretrial delays in his case is insufficient to entitle him to a certificate of appealability.

Post-Trial Delay

We stress that McCord's substantive post-trial delay claim is not before us at this time; rather, the only issue with which we are presented is the claim of ineffective assistance of counsel as it relates to the delay. McCord contends that his counsel was ineffective for failing to properly raise the issue of post-trial delay in the state courts. The district court concluded that the Sixth Amendment's speedy trial guarantee applies to the disposition of post-trial motions, such that the *Barker v. Wingo* criteria must be applied to determine if a defendant's speedy trial right was violated by the delay. The court then found that the length of the delay satisfied the first *Barker* criterion, because the post-trial motions were pending for forty-two (42) months. That delay was caused by the State, although not deliberately by the prosecution. McCord's failure to object to the delay in disposition of the motions could not be held against him, however, because *Doggett* implies rather strongly that the effective administration of the criminal justice system is not even in part the obligation of the accused, and so long as the petitioner did nothing to frustrate the disposition of his case he need not repeatedly ask the court to dispose of his motions and sentence him in order to assert his constitutional claims. Finally, under *Doggett*, it is presumed that government-caused delay results in real prejudice. While the government may rebut this presumption by showing that the defendant acquiesced in it for

tactical reasons, no such showing had been made by the government in McCord's case. Even though the *Barker* criteria appeared to weigh heavily in McCord's favor, however, the district court concluded that McCord could not establish ineffective assistance for failing to raise the post-trial delay claim because the potential application of *Doggett* to post-trial proceedings, and hence the potential success of a post-trial delay claim in McCord's case, was not clear-cut at the time of the post-trial motions. We agree.

Initially, we emphasize that this Court has not decided yet whether *Doggett* applies in the post-trial context, such that prejudice to McCord could be presumed from the very fact of post-trial delay even if he could not demonstrate actual prejudice. Additionally, at the time of the post-trial motions in McCord's case, neither *Doggett* nor *Burkett v. Cunningham*, 826 F.2d 1208, 1218 (3d Cir. 1987), which held that the Sixth Amendment's speedy trial guarantee applies to disposition of post-trial motions, had been decided.[7] Furthermore, the controlling cases in this circuit at the time of McCord's post-trial motions required a showing of prejudice to the defense or personal prejudice beyond the anxiety generally experienced by a convicted person awaiting sentencing to establish a violation of the defendant's speedy trial right on account of post-trial delay. *See, e.g., United States v. Dreyer*, 533 F.2d 112 (3d Cir. 1976). This Court even stated in *Burkett* that "once a defendant has been convicted it would be the rarest of circumstances in which the right to a speedy trial could be infringed without a showing of prejudice." 826 F.2d at 1220 (internal citation omitted).

McCord asks this Court to take this opportunity to extend

7. *Burkett* was decided while McCord's post-trial motions were pending.

Doggett to post-trial proceedings, however, and therefore to find his counsel ineffective for not raising the issue of post-trial delay. This we decline to do, because we find the issue irrelevant to McCord's appeal. As explained earlier, McCord's substantive Sixth Amendment argument is not before us; rather we are presented only with his ineffective assistance of counsel claim. Even if *Doggett* were held to apply to instances of post-trial delay at this time, this conclusion would not have been obvious to trial counsel at the time of McCord's post-trial proceedings. By failing to raise a claim which at the time did not appear to have any merit, McCord's counsel did not perform so deficiently as to deny him meaningful assistance.

Furthermore, because McCord did not present any evidence of prejudice beyond the general anxiety of a convicted person awaiting sentencing, if prejudice were not presumed under *Doggett*, he could not establish the same.[8] Consequently, at the time of McCord's post-trial motions, his counsel could not have anticipated that a federal claim for improper post-trial delay may have been successful when no actual prejudice to McCord could be demonstrated. Accordingly, we hold that McCord's counsel was not ineffective for failing to assert a federal claim of post-trial delay. McCord's ineffectiveness claim therefore fails, regardless of *Doggett*'s applicability to post-trial proceedings.

Because McCord has failed to demonstrate that he received ineffective assistance of counsel due to his attorney's failure to raise federal challenges to the delays in his case, he has not made a substantial showing that he was denied a constitutional

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8. McCord was not incarcerated, but rather was free on bail, during the appeal period. In such a scenario, little, if any, post-trial prejudice could be shown.

right. His application for a certificate of appealability therefore will be denied. 28 U.S.C. § 2253(c)(2); *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4, *reh'g denied*, 464 U.S. 874 (1983).

IV.

For the foregoing reasons, the application for a certificate of appealability is denied.

TO THE CLERK:

Please file the foregoing opinion.

BY THE COURT:

s/ illegible
Circuit Judge

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 96-3537

BRIAN T. MCCORD

Appellant

v.

MICHAEL MILLWARD, Warden; STANLEY SRAL, Parole Officer; LISA OZIO, Parole Officer; ERNEST D. PREATE, Attorney General

(D.C. Civil No. 95-CV-00148J)

Submitted Under Third Circuit LAR 34.1(a)
April 17, 1997

Before: BECKER, ALITO and MCKEE, *Circuit Judges*
(Motions Panel APS-186)

ORDER

In consideration of the foregoing opinion, the request for a certificate of appealability is denied.

BY THE COURT:

s/ illegible
Circuit Judge

DATED: JUN -3 1997

APPENDIX B — MEMORANDUM ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA ENTERED AUGUST 1, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 95-148J

BRIAN T. McCORD,

Petitioner,

v.

MICHAEL MILLWARD, WARDEN, *et al.*,

Respondents,

MEMORANDUM ORDER

This matter was referred to Magistrate Judge Keith A. Pesto for pretrial proceedings in accordance with the Magistrates Act, 28 U.S.C. § 636(b)(1), and subsections 3 and 4 of Local Rule 72.1 for Magistrate Judges.

The Magistrate Judge filed a Report and Recommendation on June 25, 1996, docket no. 7, recommending that petitioner's petition for a writ of habeas corpus be denied. The parties were notified that pursuant to 28 U.S.C. § 636(b)(1), they had ten days to serve and file written objections to the Report and Recommendation. Petitioner filed objections on July 5, 1996, docket no. 8, which I have considered.

After *de novo* review of the record of this matter, together

with the Report and Recommendation and the petitioner's timely objections thereto, the following order is entered:

AND NOW, this 1st day of Aug., 1996, it is

ORDERED that petitioner's petition for a writ of habeas corpus is denied. A certificate of appealability is denied. The Report and Recommendation is adopted as the opinion of the Court. The Clerk shall mark this matter closed.

BY THE COURT:

s/ Donetta W. Ambrose
DONETTA W. AMBROSE,
UNITED STATES DISTRICT JUDGE

cc: R. Thomas Forr, Jr., Esq.
1701 Fifth Avenue
Altoona, PA 16602

David C. Gorman, Esq.
John M. Daley, Esq.
Office of the District Attorney
413 Allegheny Street
Hollidaysburg, PA 16648

APPENDIX C — REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA DATED JUNE 25, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 95-148J

BRIAN T. McCORD,

Petitioner,

v.

MICHAEL MILLWARD, WARDEN, *et al.*,

Respondents,

Report and Recommendation

Recommendation

Petitioner filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, alleging that his conviction in 1986 and sentence in 1991 for an arson committed in 1979 are unconstitutional because his trial counsel was ineffective in failing to raise violations of his right to a speedy indictment, speedy trial, and speedy sentencing under the Sixth Amendment and Due Process Clause. I conclude that by the narrowest of margins trial counsel was not constitutionally ineffective in failing to pursue the Sixth Amendment issues. I therefore recommend that the petition for writ of habeas corpus be denied.

Appendix C

Report

Procedural history

The facts of this matter are not complicated and not in dispute. On February 27, 1979, petitioner's grocery store was destroyed by fire. Four years and eight months later, on November 4, 1983, petitioner was indicted by an investigating grand jury on a charge of arson, 18 Pa.C.S. § 3301. Petitioner's trial commenced three years later, on December 2, 1986, and petitioner was convicted on December 6, 1986. Post-trial motions were filed on December 10, 1986, and remained pending until they were denied on June 20, 1990, three and one half years later. Petitioner filed a supplemental post-trial motion six months later, on January 3, 1991, which was denied on March 19, 1991. Petitioner was sentenced to 11½-23 months imprisonment on March 19, 1991, and fined $18,000. Petitioner remained free on bail pending his timely appeal. The Superior Court affirmed his conviction and sentence on March 17, 1992, and the Pennsylvania Supreme Court denied a timely petition for allowance of appeal on November 9, 1992.

On November 16, 1992, the Court of Common Pleas ordered petitioner to begin serving his sentence on December 18, 1992. Petitioner, still represented by original counsel, filed a petition for a writ of habeas corpus in this Court on December 16, 1992, raising, *inter alia*, the issues of pre-indictment, pretrial, and post-trial delay. Petitioner's service of sentence was stayed by this Court pending disposition of the petition. Magistrate Judge Sensenich issued a Report and Recommendation on June 7, 1993, observing that throughout the direct appeal of the state court proceedings petitioner's counsel had attacked the various

delays only on state law grounds[1], that federal claims based on the delays could still be raised in the state court, and therefore recommended that the petition be denied for failure to exhaust state remedies. Chief Judge Ziegler adopted the Report and Recommendation on July 1, 1993, dismissed the petition, and dissolved the stay of execution of sentence. On July 8, 1993, petitioner filed a collateral attack on his conviction pursuant to Pennsylvania's Post Conviction Relief Act (PCRA), 42 Pa.C.S. § 9541 *et seq.*, raising, *inter alia*, federal claims based on the delays in the state trial court proceedings. The Court of Common Pleas denied the PCRA petition on its merits on August 17, 1993, declining to base its ruling on the ground argued by the Commonwealth that trial counsel was barred from asserting its own ineffectiveness in not raising the federal claim earlier.

Petitioner, represented by new counsel, timely appealed to the Pennsylvania Superior Court. The Superior Court, on May 10, 1994, affirmed the trial court's ruling on the merits of the claim as it was presented to it by new counsel, namely that former counsel had been ineffective in failing to raise the federal claims. The petitioner filed a petition on August 19, 1994 seeking allowance of appeal, timely raising the federal claims. The Pennsylvania Supreme Court denied allowance of appeal on

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1. An issue raised in support of petitioner's federal habeas corpus petition is exhausted when it has been "fairly presented" to the state court, that is, *both* the facts and the legal theory on which the claim is based have been presented, *Landano v. Rafferty*, 897 F.2d 661, 668-69 (3d Cir.) (*Landano III*), *cert. denied*, 498 U.S. 811 (1990), to the Court of Common Pleas, the Pennsylvania Superior Court, and the Pennsylvania Supreme Court. *Evans v. Court of Common Pleas*, 959 F.2d 1227, 1230 (3d Cir. 1992). A violation of Rule 1100 is a pure state law issue not equivalent to a Sixth Amendment speedy trial claim. *See Sadler v. Sullivan*, 748 F.2d 820, 825 (3d Cir. 1984).

February 16, 1996, after an 18 month delay. Petitioner had been committed to jail by the Court of Common Pleas in July 1993 and had been released on parole by this time.

Petitioner filed the petition presently before the Court on June 8, 1995, asserting the federal claims of delay, admitting that at that point the state court process had not been completed, but arguing that the delay excused exhaustion. *See Story v. Kindt*, 26 F.3d 402, 405-06 (3d Cir.) (collecting cases holding that delays of between 33 months and 12 years are sufficient to excuse exhaustion of state remedies), *cert. denied*, 130 L.Ed.2d 506 (1994). The respondent, through the District Attorney of Blair County, answered asserting that exhaustion should not be excused, and filed a supplemental answer asserting that the petition should be dismissed as moot because petitioner had completed service of his parole term shortly after the petition was filed and was no longer under any form of restraint. *See Maleng v. Cook*, 490 U.S. 488 (1989).

Since the state court has finished disposition of petitioner's claims, the question of excusing exhaustion need not be reached. With respect to the question of mootness, since the petition was filed prior to the expiration of sentence and attacks not only the service of sentence but also the fact of conviction, which conviction has significant collateral consequences, *Nakell v. Attorney General*, 15 F.3d 319, 322 (4th Cir. 1994) (defendant's interest in the return of a fine is sufficient collateral consequence to defeat mootness), the petition is not mooted by the expiration of parole. *Oyler v. Allenbrand*, 23 F.3d 292 (10th Cir.), *cert. denied*, 130 L.Ed.2d 195 (1994). I therefore proceed to the merits of the claim that prior counsel was ineffective for failing to raise federal claims based on the delays in the trial court.

Appendix C

Ineffectiveness of counsel

Ineffective assistance of counsel claims are reviewed under the two-pronged test announced in *Strickland v. Washington*, 466 U.S. 668, 687 (1984): petitioner must show: 1) that counsel performed so deficiently that a criminal defendant was denied any meaningful assistance of counsel; and 2) that prejudice resulted from the deficient performance.

The role of a federal court considering the first half of the *Strickland* test is not to Monday morning quarterback the performance of counsel, nor even to correct errors of state law, *see Robinson v. Arvonio*, 27 F.3d 877, 884 (3d Cir. 1994), but to restrict itself to "the rare claim", *see United States v. Gray*, 878 F.2d 702, 711 (3d Cir. 1989), where counsel's performance was so deficient that he was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Strickland*, 466 U.S. at 687.

In order to establish the prejudice component of the *Strickland* test, the petitioner must establish "a reasonable probability . . . that the result of the proceeding would have been different." *McAleese v. Mazurkiewicz*, 1 F.3d 159, 166 (3rd Cir. 1993) (*quoting Strickland*, 466 U.S. at 694.) That probability must be assessed in light of the record as a whole. *Gray*, 878 F.2d at 713, *citing McNeil v. Cuyler*, 782 F.2d 443, 450 n.2 (3d Cir. 1986).

A state court's legal conclusions concerning the reasonableness of counsel's performance and prejudice are not entitled to deference, and must be examined *de novo*. *Carter v. Rafferty*, 826 F.2d 1299, 1306 (3d Cir. 1987), *cert. denied*, 484 U.S. 1011 (1988); *Nelson v. Nagle*, (11th Cir. 1993); *May v.*

Collins, 955 F.2d 299, 315 (5th Cir. 1992). *Compare Parker v. Dugger*, 498 U.S. 308 (1991) (findings concerning historical facts are within Section 2254(d)'s rule of deference); *Todaro v. Fulcomer*, 944 F.2d 1081, 1084-85 (3d Cir. 1991) (affording deference to a state court's legal conclusion of no prejudice where such finding turned on factual finding by the state court that the jury did not hear a witness' invocation of his Fifth Amendment immunity), *cert. denied*, 503 U.S. 909 (1992).

Reasonableness of counsel's conduct

Counsel is not required to be perfect, or even to meet a legal malpractice standard to satisfy the constitutional minimum required by the Sixth Amendment. Only when counsel's actions or omissions could not reasonably be believed to be effecting some sort of strategy on behalf of the client do they fail the first *Strickland* test. Therefore a strategic decision to call no defense witnesses can be constitutionally effective, although practically foolish, and a deliberate decision to forego meritorious legal objections can likewise be constitutionally effective, although seemingly an automatic case of ineffectiveness. On the other hand, the failure to take a legally required step on a timely basis is the quintessence of ineffective assistance of counsel. *See Coleman v. Thompson*, 501 U.S. 722, 756-57 (1991) (failure to file timely appeal; relief denied because no right to effective assistance of counsel in collateral proceeding[2].) Similarly, the failure to raise an obvious claim or defense not inconsistent with counsel's overall strategy can be ineffectiveness.

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2. The Sixth Amendment guarantees petitioner the right to state-provided effective assistance of counsel at trial, *Strickland v. Washington*, 466 U.S. 668 (1984), and on any first appeal of right. *Evitts v. Lucey*, 469 U.S. 387 (1985). Petitioner has no constitutional right to counsel in any discretionary appeal, *Ross v. Moffit*, 417 U.S. 600 (1974), or in any collateral proceeding, *Pennsylvania v. Finley*, 481 U.S. 551 (1987).

Appendix C

There is no contention here that the failure to raise federal speedy trial claims was part of petitioner's trial counsel's strategy, and it is obvious that the federal constitutional claims would have been consistent with, not contradictory to, the state law claims asserted. It is therefore necessary to examine whether petitioner's trial counsel's failure to raise federal claims was the overlooking of such an obviously meritorious defense that counsel was not performing as the counsel guaranteed by the Sixth Amendment.

Pre-indictment delay

Counsel's failure to raise a federal claim based on the four year eight month delay between the arson and the indictment was not ineffectiveness because the claim would not have succeeded on its merits. *United States v. Marion*, 404 U.S. 307 (1971), established that there is no pre-indictment delay claim available under the Sixth Amendment. The primary protection for the citizen against prosecutions which take an unreasonably long time to commence is the statute of limitations, which concededly had not expired at the time the petitioner was indicted. After *United States v. Lovasco*, 431 U.S. 783 (1977), there is a due process claim that can be asserted in cases where the pre-indictment delay, although legal, is prolonged simply to give the prosecution an unjust advantage over the accused, as for instance by waiting until a key defense witness dies. *See Commonwealth v. Sneed*, 514 Pa. 597, 526 A.2d 749, 752-53 (1987); *Commonwealth v. Grazier*, 391 Pa.Super. 202, 570 A.2d 1054 (1990). The petitioner does not make a sufficient assertion of that violation in the instant petition[3], and the issue need not

3. Petitioner does assert that trial counsel was ineffective in failing to produce witnesses or evidence in support of a claim of a violation of due process and lists seven witnesses who, he claims, "could have

(Cont'd)

be explored further. *Todaro v. Fulcomer*, 944 F.2d at 1082 (A federal court considering a petition for a writ of habeas corpus must first determine whether the petitioner has asserted facts that if proved would entitle him to relief, and second whether an evidentiary hearing is necessary to determine the facts.)

Pre-trial delay

The four-criteria balancing test set forth in *Barker v. Wingo*, 407 U.S. 514 (1972), to determine whether pre-trial delay violates the Sixth Amendment requires this Court to ask: 1) how long was the delay; 2) what was the reason for, i.e., whose fault was the delay; 3) was there an assertion by the defendant of his speedy trial rights, and 4) was there prejudice to the defendant.

The length of the pre-trial delay, approximately three years, is sufficient under the first *Barker* criteria to call for further scrutiny. *See Doggett v. United States*, 120 L.Ed.2d 520, 528

(Cont'd)

countered evidence by the Commonwealth," but who died prior to trial. This is inadequate to call for an evidentiary hearing since petitioner does not claim either that he told his trial counsel about these witnesses, *see Lewis v. Mazurkiewicz*, 915 F.2d 106, 111 and 113 (3rd Cir. 1990) (defense counsel may properly rely on information supplied by the defendant in determining the nature and scope of investigation and is not obliged to pursue *sua sponte* every potential defense or investigation), or that the delay by the Commonwealth in indicting petitioner resulted from an intent to prejudice the defendant and not the pace of the investigation, *see Commonwealth v. Sneed*, 526 A.2d at 753. The same failure to do more than assert that there were two witnesses that petitioner felt would have been helpful to his defense that trial counsel could have called, Petition at 25, urges against hearing petitioner's claim of ineffectiveness based on trial stewardship. Finally, the ineffectiveness claims based on alleged juror misconduct, Petition at 25-26, are insubstantial.

n.1 (1992) (Delays in excess of one year call for further *Barker* enquiry.); *Story v. Kindt*, 26 F.3d at 405-06 (3d Cir.) (delays of between 33 months and 12 years sufficient); *Coe v. Thurman*, 922 F.2d 528, 531 (9th Cir. 1990) (Appellate delay of between 3 and 8½ years establishes first of *Barker* criteria.)

As to the second *Barker* criteria, the state court found that responsibility for the delay was divided between the prosecution and the defense, the Commonwealth being responsible for the delay caused by a backlog of criminal cases, "although . . . less heavily than a deliberate attempt . . . to hamper the defense", *Commonwealth v. McCord*, 1473 PGH 1993, Superior Court slip opinion at 11 (May 10, 1994), and the petitioner being responsible for two requested continuances (the Superior Court does not discuss their length but the docket sheet indicates that one of the continuances was only for two months) and for the "substantial portion of the delay" caused by "litigation of [petitioner's] pretrial motions." *Id.* at 10. As constrained by state law, the Superior Court found that a reasonable amount of time consumed by disposition of motions regardless of their source is justifiable delay. *See Commonwealth v. Ware*, 459 Pa. 334, 329 A.2d 258 (1974).

Examining the last two factors, the state court found that the petitioner's lack of assertion of the right to a speedy trial weighed against him and the petitioner's freedom on bail mitigated any claim of prejudice. The Superior Court discounted the allegations that the delay caused petitioner anxiety, dismissing the petitioner's claim because of his failure to demand a speedier trial.

Precedent in the United States Supreme Court and the Court of Appeals for this circuit interpreting the Sixth Amendment

must be followed in preference to state court constructions of the same, and that precedent is contrary to the conclusions of the state court.

In assigning fault for the pre-trial delay it must be remembered that despite the separation of the prosecutorial and judicial branches of state government, from the point of view of the citizen the State is the State. It does not matter from a constitutional standpoint whether pretrial delay is due to the court's disposition of pre-trial motion or the prosecution's legitimate investigative purposes: both are delay attributable to the State. *Burkett v. Cunningham*, 826 F.2d 1208, 1223 (3d Cir. 1987) (*Burkett I*). There is no claim here that petitioner's pretrial motions were not legitimate or were filed for the purpose of delay, and the docket of this matter shows that at least in part the motions were considered meritorious.

Lack of a demand for a speedy trial is a relatively minimal consideration where the delay is excessive and a demand would likely be futile. *See Story*, 26 F.3d at 406 n.8. This is not the case presented in *Barker* of a defendant deliberately gambling that delays would help his case, and absent the withdrawal of his pre-trial motions the petitioner could not remove the source of delay simply by demanding a speedy trial. It is not the Hobson's choice of the accused to forego filing pre-trial motions or accept whatever delay they may occasion.

Finally, "excessive delay presumptively compromises the reliability of a trial," *Doggett*, 120 L.Ed.2d at 531, and notwithstanding the lack of a demand for a speedy trial delay not caused by the accused is prejudicial in and of itself. *Doggett*, placing the burden on the government to rebut the presumption of prejudice, dismissed an indictment where the government's

negligent delay in locating defendant caused an 8½ delay in trying the defendant.

Nevertheless, a finding of ineffectiveness cannot be made on this ground, since it would not have been apparent to any trial counsel prior to trial in 1986, and probably not until *Doggett* in 1992, that a federal claim based on pre-trial delay could have had a reasonable chance of success.

Further, as the Court of Appeals pointed out in *Heiser v. Ryan*, 15 F.3d 299, 306 (3d Cir.), *cert. denied*, 130 L.Ed.2d 276 (1994) (*Heiser II*), the discharge of a petitioner pursuant to a writ of habeas corpus is typically granted only conditionally in claims of unconstitutional delay, in order to spur the offending court to dispose of a matter more swiftly. If counsel had asserted the federal claims of pretrial delay in the state court, whether at the trial court level or by seeking a writ of mandamus from the appellate courts, it is doubtful he could have obtained any relief other than a speedier trial. Since any such request is moot, and petitioner would probably not have received the relief he seeks here, absolute discharge, petitioner cannot prove the prejudice component of the *Strickland* test either.

Post-trial delay

The Sixth Amendment's speedy trial guarantee, as articulated in *Barker v. Wingo*, applies to disposition of post-trial motions. *Burkett I*, 826 F.2d at 1218. Prolonged delay in processing the direct appeal of a convicted defendant has served not only to excuse exhaustion as a barrier to consideration of a habeas petition, *Story v. Kindt*, 26 F.3d at 402, but also to serve as a basis for discharge from or reduction of sentence. *Burkett v. Fulcomer*, 951 F.2d 1431, 1447 (3d Cir. 1991), *cert. denied*, 120 L.Ed.2d 921 (1992) (*Burkett III*).

Appendix C

The length of the delay satisfies the first *Barker* criterion: the post-trial motions in this matter were pending for 42 months. After they were denied, another 6½ months passed, presumably during which a presentence investigation was conducted, and petitioner filed a supplemental post-trial motion which was disposed of in 2½ months.

Examining the reason for the delay, the state court found that because there was no claim that the prosecution deliberately caused the delay, the delay "must be weighed against the Commonwealth, but not heavily so." *Commonwealth v. McCord*, Superior Court slip opinion at 11. The state court found that petitioner's failure to request speedy disposition of his post-trial motions and demand to be sentenced weighed against him at the third stage of the *Barker v. Wingo* test, and that his claim of prejudice was minimal because he was free on bail pending sentencing.

As discussed above, *Burkett I* and *Story* hold that it is not the obligation of the accused to make a special request for disposition of duly filed motions, and it is difficult to imagine what purpose taking such a step would serve other than to irritate the judge considering the motions. It can be presumed that any judge considering any motion is not delaying disposition of the matter until a demand is made for speedy disposition. *Doggett* implies rather strongly that effective administration of the criminal justice system is not even in part the obligation of the accused, and so long as the petitioner did nothing to frustrate the disposition of his case he need not repeatedly ask the court to dispose of his motions and sentence him so that he may assert his constitutional claims.

Finally, it is necessary to consider prejudice. *Doggett*, 120

L.Ed.2d at 532, presumes that government-caused delay results in indefinite but real prejudice, which presumption the government must either rebut or extenuate by showing that the defendant acquiesced in it for tactical reasons. *Id.*, *citing Barker*, 407 U.S. at 534-36. The government has not rebutted that presumption here. If *Doggett* applies in the post-trial context, then petitioner has a meritorious speedy trial claim based on the delay in disposition of his post-trial motions. On the other hand, petitioner did not present any special evidence of prejudice beyond the anxiety generally experienced by a convicted person awaiting sentencing, *see e.g. United States v. Dreyer*, 533 F.2d 112 (3d Cir. 1976) (mental disturbance culminating in suicide attempt), so that if *Doggett* does not apply to post-trial claims, petitioner's claim of ineffective assistance of counsel must fail.

In *Heiser II*, 15 F.3d at 304, the Court of Appeals expressly refused to affirm or reverse the holding of Judge Diamond of this Court that *Doggett* applies to post-trial claims. *See Heiser v. Ryan*, 813 F.Supp. 388, 397 (W.D.Pa. 1993), *aff'd* 15 F.3d 299, 306 (3d Cir.), *cert. denied*, 130 L.Ed.2d 276 (1994). I believe that when confronted with the appropriate case, and this may be the one, the Court of Appeals and the Supreme Court will extend *Doggett* to post-trial proceedings. In the context of the claim of ineffectiveness of counsel, however, the possible application of *Doggett* to petitioner's case was not so clear-cut at sentencing in 1991 that no reasonable defense counsel could have failed to assert the claim. Petitioner therefore fails to prove a claim of ineffectiveness based on former counsel's failure to assert a federal claim of delay in the disposition of his post-trial motions.

Summary

Petitioner would have a claim for ineffective assistance of

counsel if it would have been obvious to any competent counsel that a federal claim of post-trial delay would have been successful if it had been raised in the state court[4]. Given that *Burkett I*, the seminal case in this circuit on the issue of post-trial delay, arose out of the very county and at the very same time that petitioner's post-trial motions were pending, it is probable that most attorneys would have asserted federal post-trial delay claims after *Burkett I* was issued in 1987, and certainly by 1990. Petitioner's trial counsel was nevertheless not ineffective for failing to do so, because before *Doggett* his claims would not likely have been at all successful, and because *Heiser II* and *Burkett III* make it clear that petitioner would not in any case have received the relief he seeks, absolute discharge. He would only have received speedier disposition of his state court proceedings, which have already been completed. Therefore, the failure of trial counsel to raise federal claims did not prejudice the petitioner. Under *Strickland v. Washington*, trial counsel was not ineffective.

Pursuant to 28 U.S.C. § 636(b)(1), the parties are given notice that they have ten days to serve and file written objections to this Report and Recommendation.

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4. If the Court decides that *Doggett*'s presumption of prejudice applies to claims of post-trial delay, and that this conclusion should have been obvious to trial counsel, then petitioner should prevail. The object of the writ of habeas corpus, when there has been a violation of constitutional rights, is to "rectify the prejudice of the violation." *Burkett III*, 951 F.2d at 1447 (3d Cir. 1991). Since in this matter there is no way that the prejudice caused by delay can be rectified, petitioner having been punished to the full extent that the law can punish him, the only remedy that could be granted is a writ absolutely discharging petitioner from his conviction.

Appendix C

DATE: 25 June 96

s/ Keith A. Pesto
Keith A. Pesto,
United States Magistrate Judge

cc: R. Thomas Forr, Jr., Esq.
1701 Fifth Avenue
Altoona, PA 16602

David C. Gorman, Esq.
John M. Daley, Esq.
Office of the District Attorney
413 Allegheny Street
Hollidaysburg, PA 16648

APPENDIX D — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING DATED AUGUST 26, 1997

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 96-3537

BRIAN T. MCCORD

Appellant

v.

MICHAEL MILLWARD, Warden; STANLEY SRAL, Parole Officer; LISA OZIO, Parole Officer; ERNEST D. PREATE, Attorney General

(D.C. Civil No. 95-CV-00148J)

Present: BECKER, ALITO and McKEE, *Circuit Judges.*

SUR PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING IN BANC

The petition for rehearing filed by Appellant, having been submitted to the judges who participated in the decision of this court and no judge who concurred in the decision having asked for rehearing, the petition for panel rehearing is DENIED.

Appendix D

BY THE COURT:

s/ illegible
Circuit Judge

DATED: AUG 26 1997

APPENDIX E — CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution

Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment XIV:

> **Section 1.** All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.